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No. 08-1412

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STEVEN J. THOROGOOD, on behalf of himself and all others similarly situated,

Petitioner,

v.

SEARS, ROEBUCK AND CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Respondent's Question Presented ignores unrebutted evidence that Respondent uniformly misrepresented and omitted a material characteristic of the laundry dryers in question: that the purportedly "stainless steel" dryer drums were only partially stainless steel. However, the Seventh Circuit Court of Appeals, aligning itself with the Second, Fourth, Fifth, and Eleventh Circuits, held that this common class-wide material misrepresentation cannot satisfy Federal Rule 23(a)(3)'s "predominance" requirement, instead adopting an impossible standard that requires examination of the class members' underlying motivations behind their reliance for their purchases, rather than the objective material misrepresentation standard (examining only the fact of reliance) adopted by the First, Third, Eighth, Ninth and Tenth Circuit Courts of Appeals.

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Case:

In re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F.3d 6 (1st Cir. 2008) 3, 6, 7, 8

Rule:

Federal Rule of Civil Procedure 23(b)(3) .. 1, 3, 6, 8, 9

REPLY IN SUPPORT OF GRANTING THE PETITION

Petitioner Steven J. Thorogood ("Petitioner" or "Plaintiff") respectfully submits this reply in support of his petition for a writ of certiorari.

Respondent Sears, Roebuck and Co.'s ("Respondent" or "Sears") Brief in Opposition misstates the facts and law. The issue here is whether a uniform misrepresentation of a product's composition (a laundry dryer's "stainless steel" drum), which is a feature that commands a substantial price premium and is material to a customer's purchase decision, can support common proof of class-wide reliance for class certification under Federal Rule of Civil Procedure 23(b)(3).

PETITIONER'S REPLY IN SUPPORT OF GRANTING THE PETITION

Respondent Sears' denial of having made any representations that the Kenmore laundry dryer drums were "100% stainless steel" (Br. in Opp. 2-3, 18) ignores that Sears explicitly advertised the Kenmore laundry dryers as three grades: "Good" (featuring a drum Sears represented as enamel-coated mild steel), "Better" (featuring a "Stainless Steel Drum Back with white power-coated drum"), and "Best" (featuring a "Stainless Steel Drum and Drum Back");[1] which Sears priced accordingly.

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[1] During discovery, Sears refused to produce any point-of-sale representations Sears made at Sears' stores. However, the Kenmore Buying Guide advertisement attached as "Exhibit A" (Cont'd)

Sears' Opposition Brief also ignores that the class had been certified by the District Court based on Sears' objective, uniform and material misrepresentations, but subsequently decertified in the Seventh Circuit's view that Plaintiff must prove each class member's subjective *motivations* for valuing the misrepresented attribute, instead of proving class-wide causation objectively through common proof (here, the common proof that (1) each class member paid a premium for the feature of a "stainless steel" drum, over lesser-priced dryers Sears advertised as containing mild steel drums or only partially stainless steel drums (Pet. 6-7), and (2) a dryer drum composed entirely of stainless steel dramatically increased the "delivery of superior fabric care" over drums containing mild steel parts, which is the "primary factor" in a consumer's decision to purchase a certain laundry dryer (Pet. 10-11)).

In doing so, the Seventh Circuit imposed an impossible subjective test, requiring Plaintiff to prove each class member's subjective motivations, rather than their objective reliance; rejecting the view of the majority of federal circuits, and "forbidding district courts from relying on plaintiffs' allegations of

(Cont'd)

to Plaintiff's motion for class certification in the District Court shows Sears explicitly ranking the models as "Good" (listing models with a powder-coated mild steel drum), "Better" (explicitly representing these models as having the "Step Up Feature" of a "stainless steel drum back with white powder-coated drum"), and "Best" (listing the "Step Up Feature" of a "stainless steel drum and drum back"), of which the "Best" (i.e., fully stainless steel drum) models are the subject of this class action. (Pet. 10.)

sufficiently common proof and requiring the courts to make specific findings that each Rule 23 criterion is met." *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6, 24 (1st Cir. 2008) (noting the "substantial differences" between the Second, Fourth, Fifth and Seventh Circuits' heightened degree of individual proof required for Rule 23 class certification and the Third and Eighth Circuits' holdings that common proof can support a class-wide rebuttable presumption).

Respondent's opposition misstates the record and ignores the split among the circuits over whether the requisites of Rule 23 can be shown "objectively" through common proof or must be shown individually for each class member.

I. Respondent Significantly Misstates the Factual Record Regarding Plaintiff's Common Proof of Reliance for the Class.

Sears' opposition brief outrageously misstates the Record in claiming that "Thorogood certainly did not show that Sears made any uniform statements in advertisements . . . that its dryers were '100%' or 'fully'" stainless steel, or "would always be rust free." (Br. in Opp. 4.)

First, it is undisputed that in *every* advertisement explaining the Kenmore laundry dryers in question, Sears described the relevant models' drums only as "stainless steel" as distinct from lesser grade dryers described as having only *partially* stainless steel drums (Pet. 10), omitting the fact that the "stainless steel" dryer

drums contained a mild steel "drum front."[2] Nor did Sears rebut the materiality of Sears misrepresentation. Indeed, Sears' own head laundry buyer Dan Pigatto declared that a *fully* stainless steel drum provides "superior fabric care" for a variety of reasons, and superior fabric care is the "primary" consideration for laundry dryer purchasers. Pet. 23. Moreover, the materiality of Sears' omission is shown by the fact that all purchasers paid a premium for dryers with a purportedly "stainless steel drum," due to its perceived superiority and higher production costs and raw material costs of stainless steel, and which Sears included only on its "Best" premium priced laundry dryers. (Pet. 10.)[3]

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[2] While Sears describes the rustable mild steel portion of the dryer drums as merely a "front flange," there is no dispute that the part is actually called the "drum front," according to the laundry dryers' manufacturer, Electrolux Home Products, Inc. *See* Pet. 6-7.

[3] While the premium class members paid for the Kenmore laundry dryers shows the materiality and, ultimately, class members' reliance on Sears' misrepresentation, the fact that class members paid a premium for a product with a diminished value is *not* Plaintiff's "theory" of Sears' liability, as Sears misleadingly claims at page 24 of its Brief in Opposition. Nor is Plaintiff's theory that all class members suffered rust damage to their dryers. (Br. in Opp. 23.) Instead, Plaintiff's theory of Sears' liability is that it deceptively induced consumers into purchasing the laundry dryers in question through an omission of a material characteristic of that laundry dryer which, if proven, would satisfy the consumer protection statutes of every jurisdiction included in the class. (Pet. 20) (noting that Plaintiff limited the class to only those states' whose consumer protection statutes applied the same substantive legal standards as Tennessee's Consumer Protection Act).

Second, Sears' repeated assertion that it never represented the drums as "fully" or "100%" stainless steel (Br. in Opp. 4) is outright false because Sears explicitly represented the "stainless steel" drums as a "Step Up Feature" over Kenmore laundry dryers advertised with *partially* stainless steel drums. It is undisputed that during the time Thorogood purchased his Kenmore dryer, Sears offered Kenmore dryers with three types of drums: (1) "Good" dryers, containing drums described only as enamel-coated mild (i.e., corrodible) steel, (2) "Better" dryers, with drums described as containing both mild steel and stainless steel ("stainless steel drum back with white powder-coated drum"), and (3) the "Best" dryers, containing drums described only as "stainless steel." Pet. 10. Sears' "Stainless Steel drum" description of the Kenmore laundry dryer drums in question clearly conveyed the representation as "fully" or "100%" stainless steel.

Therefore, Plaintiff *did* show that Sears uniformly represented the Kenmore dryers as having a "stainless steel drum," and that this uniform representation omitted the fact that the drums contained mild steel "drum fronts" that were susceptible to rust. Plaintiff showed this omitted fact to be material because (1) purchasers paid a premium for this feature, over drums described as only partially stainless steel, and (2) Sears' head laundry buyer provided unrebutted testimony that *fully* stainless steel drums materially affect a consumer's decision to purchase a laundry dryer.

II. Because Plaintiff Provided Common Proof that All Class Members Relied Upon Sears' Uniform and Material Misrepresentation, the Seventh Circuit's Decertification on the Basis that Plaintiff Must Prove the Particular Motivation for Each Class Member's Reliance Establishes an Impossible Standard that Effectively Nullifies Rule 23 in the Consumer Fraud Context.

Sears' Brief in Opposition significantly misstates the conflict among the federal circuits regarding whether Rule 23's requisites can be shown by common proof. The conflict is not that certain circuits "presume reliance in consumer fraud cases." (Br. in Opp. 10.) Rather, the issue is whether a rebuttable presumption that all class members relied on a misstatement is created when a plaintiff presents proof common to all class members (here, that all purchasers of the Kenmore laundry dryers paid a premium for a uniformly misleading product).

As the First Circuit Court of Appeals explained in *In re New Motor Vehicles*, the fraud-on-the-market presumption of reliance is just one example of reliance being shown class-wide "through common proof." 522 F.3d at 25 (siding with the Third and Eighth Circuits' allowance of common proof to show Rule 23 predominance when plaintiff's theory of liability is "viable").

Sears next argument, that the availability of the fraud-on-the-market theory in federal securities fraud claims "have no relevance here because they are governed by unique rules having no application to the state law consumer fraud claims," (Br. in Opp. 11), misstates the point. Petitioner does not seek to extend the fraud-on-the-market theory to the consumer fraud context. Rather, Petitioner's argument is that Rule 23(b)(3)'s predominance requirement **can** be proven by common proof, *similar to* the fraud-on-the-market theory. (Pet. 28-30.) As *In re New Motor Vehicles* goes on to explain, a plaintiff should be able to objectively show that predominance is met class-wide as long as plaintiff can put forth viable common proof that logically creates a presumption that all class members relied upon the misrepresentation:

> Plaintiffs cannot make their case without common proof of causation, and they can only prove causation through common means if their novel theory is viable; that viability in turn depends on their ability to establish–whether through mathematical models or further data or other means–the key logical steps behind their theory.

522 F.3d at 26-27. The Seventh Circuit's reversal squarely rejects this common proof method of satisfying Rule 23, imposing an impossible standard, requiring Plaintiff to show each class members' underlying subjective motivation for purchasing the laundry dryers:

> The evaluation of the class members' claims will require individual hearings. Each

> class member who wants to pursue relief against Sears will have to testify to what he understands to be the meaning of a label or advertisement that identifies a clothes dryer as containing a stainless steel drum. Does he think it means that the drum is 100 percent stainless steel because otherwise his clothes might have rust stains, or does he choose such a dryer because he likes stainless steel for reasons unrelated to rust stains and is indifferent to whether a part of the drum not easily seen is made of a different material?

(Pet. App. 25a-26a.)

Therefore, the Seventh Circuit's ruling aligns with the Second, Fourth, Fifth and Eleventh Circuits that, according to *In re New Motor Vehicles*, "forbid[ ] district courts from relying on plaintiffs' allegations of sufficiently common proof and requiring the courts to make specific findings that each Rule 23 criterion is met." 522 F.3d at 24 (internal citations omitted). This essentially eliminates the viability of Rule 23 in the consumer fraud context, and should be reviewed by the Court, and reversed in favor of the standard by the First, Third, Eighth, Ninth and Tenth Circuits' objective reliance standard.[4]

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[4] As shown in Plaintiff's Petition at pages 26-31, in addition to the circuit conflict set forth in *In re Motor Vehicles*, the Ninth and Tenth Circuits also permit a rebuttable presumption of (Cont'd)

CONCLUSION

The Seventh Circuit's ruling in *Thorogood v. Sears*, that Rule 23's requisites cannot be shown objectively through common proof, profoundly threatens the viability of any consumer fraud class actions brought under Rule 23 and squarely presents a vehicle to resolve the conflict between (a) the Second, Fourth, Fifth, Seventh and Eleventh Circuits' demand for uniformity of motivation, and (b) the First, Third, Eighth, Ninth and Tenth Circuits' requirement of only uniformity of marketing and reliance. Therefore, the Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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reliance where plaintiff offers a viable theory of common proof for each class member, while the Eleventh Circuit also takes the Seventh Circuit's position that common proof cannot satisfy the requisites of Rule 23.